No. 286

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,

Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION, *et als.,*

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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July 31, 1945.

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THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,

Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION, *et als.,*

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

The Denver and Rio Grande Western Railroad Company, the Debtor in the proceeding under Section 77 of the National Bankruptcy Act, hereby applies for a Writ of Certiorari to review the decrees of the United States Circuit Court of Appeals for the Tenth Circuit entered on May 10, 1945, reversing orders of the District Court for the District of Colorado approving and confirming a plan of reorganization under said Section 77 for the Petitioner and The Denver and Salt Lake Western Railroad Company, a wholly owned subsidiary of the Petitioner. A Petition for a Writ of Certiorari to review these decrees is in process of filing by Reconstruction Finance Corporation and certain others, as Petitioners. The granting of their petition would bring up part of the case but not all of the case. This Petitioner

believes that if this proceeding is to be brought to this Honorable Court at all on Writ of Certiorari it should be brought here in its entirety.

Especially is it important for this Court to be in a position to review so much of the decision of the Circuit Court of Appeals as purports to approve a finding that the claims of the Preferred stockholders and owners of Common Stock of the Debtor are valueless and that they may be lawfully barred from participating in a Plan of Reorganization—a finding said to have been left undisturbed by reason of the broad language of the opinions of this Court rendered March 15, 1943 in *Ecker et als.* v. *Western Pacific Railroad Corporation* and *Group of Institutional Investors, et als.* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company.*

Accordingly, the Petitioner asks that a Writ of Certiorari issue to review said decrees in the event, but only in the event, that this Court (a) shall determine to grant Writs of Certiorari pursuant to a petition filed or to be filed herein by Reconstruction Finance Corporation and others as Petitioners, or (b) shall determine to review and reconsider its own decisions in *Ecker, et als.* v. *Western Pacific Railroad Corporation* and *Group of Institutional Investors, et als.* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, and certain earlier decisions upon which those rendered on March 15, 1943 are in part based.*

This Petitioner contends and respectfully urges that the Petition for Writs of Certiorari filed by Reconstruction Finance Corporation and others is without merit and should be denied. To avoid duplication of the argument against the granting of that Petition, this Petitioner adopts as its

* The titles and the citations of the cases here referred to are: *Case* v. *Los Angeles Lumber Products Company*, 308 U. S. 109 (1939); *Consolidated Rock Products Company* v. *Du Bois*, 312 U. S. 510 (1941); *Ecker, et als.* v. *Western Pacific Railroad Corporation*, 318 U. S. 448 (1943); *Group of Institutional Investors, et al.* v. *Chicago Milwaukee, St. Paul and Pacific Railroad Company*, 318 U. S. 523 (1943).

answer thereto such answer as shall be filed by the City Bank Farmers Trust Company, as Trustee under the Debtor's General Mortgage, reserving the right, however, to supplement such answer within the period permitted by the rules of this Court.

Should this Court nevertheless (a) either determine to grant said Petition for Writs of Certiorari, or (b) determine that the time is ripe for a comprehensive review and reconsideration of its own decisions in the cases referred to above, then this Petitioner respectfully asks that this Petition of the Debtor be granted as the basis for a reconsideration of all questions arising under Section 77 and Chapter X of the National Bankruptcy Act, including those referred to in the Report of the Judiciary Committee of the House of Representatives as set out in footnote 2 to the concurring opinion of Circuit Judge PHILLIPS, annexed hereto as Appendix A.

Reasons for the Granting of the Petitioner's Application for a Writ of Certiorari

The Petitioner respectfully specifies five rulings of this Court which it contends should be reconsidered and which are set out below in sections of this Petition, lettered from (a) to (e), both inclusive. The Petitioner contends that these rulings are unsound because contrary to precedent and predicated upon misinterpretations of the Congressional legislation referred to above.

(a) *Judicial Review Under Section 77.*

One of the most insidious encroachments upon fundamental rights guaranteed by the Fifth and Fourteenth Amendments to the Constitution has been accomplished through the introduction into our scheme of Government of what is commonly referred to as "the administrative

Board." In the exigencies of the war the number of such Boards has increased to an alarming extent. Among the earliest, if not the earliest, of these Boards is the Interstate Commerce Commission, which over a period of nearly fifty years prior to the enactment of Section 77 of the National Bankruptcy Act had achieved a splendid record of public service.

Under a line of decisions of this Court which stem back to *Interstate Commerce Commission* v. *Illinois Central Railroad Company* (215 U. S. 471) the action of such a Board is for most, if not for all, practical purposes outside of the scope of effectual judicial review. In view of the increase in the number of such Boards and the vastly increased power which many of them enjoy, it may well be that this line of decisions should be reconsidered quite apart from the problems incident to railway reorganization. At least this seems to have been the view of the late Joseph P. Eastman, a profound student of Governmental problems, and for many years an outstanding member of the Interstate Commerce Commission. In an address delivered shortly before his death Commissioner Eastman said:

> "The courts were at one time much too prone to substitute their own judgment on the facts for the judgment of administrative tribunals. They are now in danger of going too far in the other direction. The principle that it is an error of law to render a decision not supported by substantial evidence is a salutary principle. The courts should enforce it. * * *" (I. C. C. Practitioners' Journal, April, 1944, p. 627.)

Congress itself has been neither unmindful of the evil to which Mr. Eastman here refers, nor innocent of its implications. This was made manifest by its passage in 1943 of the Walter-Logan Act providing for an efficient judicial review of the action of many such administrative Boards, which failed to receive Presidential approval because of possible interference with the war effort.

But as early as 1933 when Congress formulated and adopted Section 77 of the National Bankruptcy Act, it recognized that the existing statutory provision for judicial review of the action of the Interstate Commerce Commission was inadequate and included a provision for a judicial review for which nothing even approaching a prototype can be found in any earlier Congressional legislation. This is the provision in subsection (e) that no Plan of Reorganization certified by the Interstate Commerce Commission may be approved by the Court unless the Court is "satisfied" that the plan

> "is fair and equitable, affords due recognition to the rights of each class of creditors or stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of various classes of creditors or stockholders."

Obviously no Court can be "satisfied" that a Plan of Reorganization is fair and equitable and meets the other requirements of subsection (e)if it knows that the Interstate Commerce Commission has undervalued the Debtor's Estate or has undercapitalized the reorganized company, or as in the instant case, has taken millions of dollars of impounded income from one creditor and given it to another creditor; or, if it is left in a state of constructive ignorance on these vital points. By explicit provisions of subsection (e) Congress gave creditors and equity owners an assurance that these things could not happen and that their liens and equities could not be confiscated unless the Court was "satified" as to every finding of fact and conclusion of law implicit in subsection (e). But by excluding from judicial review such findings and conclusions of the Interstate Commerce Commission as relate to valuation and capitalization this Court has for all practical purposes expunged subsection (e) as a part of Section 77 in so far as it relates to the function of the Court.

(b) *Inhibition of Interest Abatements.*

A new, and we submit an entirely erroneous doctrine, is engrafted upon the body of our reorganization law by the ruling of this Court under the former Section 77B of the National Bankruptcy Act in *Case* v. *Los Angeles Lumber Company* (308 U. S. 109) reiterated in subsequent cases that a Plan of Reorganization is unfair and inequitable which involves any abatement of past or future contract interest on senior lien debt. Many, if not most of the corporate reorganizations perfected in this last half century run counter to this ruling of this Court for which no authority at all is cited and which is contrary to the decision of this Court in *Canada Southern Railway Company* v. *Gebhard* (109 U. S. 527) where all accrued and unpaid interest on senior debt was unprovided for in a Plan of Reorganization held by this Court to be fair and equitable. This question is of critical importance in view of the current radical readjustments in the rates for the hire of money.

(c) *Reorganization vs. Liquidation.*

A ruling of this Court which is resulting in unnecessary and, we respectfully submit, unjustifiable sacrifice of many valuable equities is the ruling under the former Section 77B in *Du Bois* v. *Consolidated Rock Products Company* (312 U. S. 512) reiterated in subsequent cases that a Plan of Reorganization is unfair and inequitable which gives recognition to junior creditors and stockholders unless senior lien creditors are given "full compensatory treatment" and are "made whole." This ruling ignores the historical difference between reorganization and liquidation recognized in *Northern Pacific Railway Company* v. *Boyd* (228 U. S. 482) and is just as oppressive to the senior lienors as it is to those in the lower strata. It forces the senior creditor either to change from a creditor to an equity position and to assume responsibility for management which he does not want or to forfeit the going concern value which will be lost in liquidation.

(d) *The Shifting Back and Forth of the Effective Date of a Plan.*

It may well be doubted whether this Court fully understood the consequence of its ruling in the two cases decided March 15, 1943 that Congress intended to give to the Interstate Commerce Commission a plenary, unreviewable power to move backward and forward the effective date of a Plan of Reorganization without regard to its disturbance of vested property rights. Subsection (1) of Section 77 provides in clear, unambiguous language,

> "In proceedings under this Section * * * the rights and liabilities of creditors and of all persons with respect to the debtor and its property shall be the same as if * * * a decree of adjudication had been entered on the day when the debtor's petition was filed."

This fixes all property rights as of a specific date which Congress obviously did not intend to authorize an administrative Board to alter. It may well be that the Interstate Commerce Commission is given power to prescribe a more convenient date as the effective date of a Plan or as the date to be borne by new securities; but certainly not without providing for the adjustments necessary to preserve all property rights vested on the date which Congress specified. If this Court in its rulings in the two cases decided March 15, 1943 intended to hold that the Interstate Commerce Commission was empowered by subsection (b) or any other provision of Section 77 to alter rights as fixed by subsection (1)—a power claimed by the Commission and rather ruthlessly exercised—then the Petitioner respectfully urges that the rulings should be reconsidered.

(e) *Maximum Capitalization.*

That Congress did not, as this Court held in the two cases decided March 15, 1943, intend to give the Interstate Commerce Commission power to prescribe maximum capi-

talization in a proceeding under Section 77, has been made clear by the report of the Judiciary Committee quoted in the annexed concurring opinion of Circuit Judge PHILLIPS. Specific authority is given to the Commission by subsection (b) to limit the proportion of the total capitalization represented by fixed interest bearing debt—a provision which would be quite unnecessary if the Commission's power to limit all capitalization was plenary. The reason why the Commission's reorganization policy has failed so completely and has been subjected to such widespread criticism is that it has assumed a reduction of capitalization to be of more consequence in the public interest than the protection of private property.* But, as Circuit Judge PHILLIPS points out in his concurring opinion in this case—"Private property may not be taken in the public interest without just compensaton."

There are now pending in the Federal District Courts either in equity or under Section 77 of the National Bankruptcy Act twenty separate proceedings for reorganization of Class I Rail carriers. The aggregate of the equity securities of these twenty corporations is $1,305,447,300. If this Court permits the Interstate Commerce Commission to go forward in these twenty proceedings with the reorganization program which it claims is sanctioned by the two decisions of this Court rendered March 15, 1943, every dollar of this huge equity will be ruthlessly taken from the owners, although the Judiciary Committee has officially declared that these decisions were rendered under a misconception on the part of this Court of the intent and purpose of the National Bankruptcy Act.

WHEREFORE, your Petitioner respectfully prays that if upon application of Reconstruction Finance Corporation and others this Court issues in the cases hereinafter specified its writ of certiorari under the Seal of this Honorable

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* See Railroad Reorganization under Section 77 of the Bankruptcy Act, Congressional Record, June 27, 1945, Vol. 91, No. 128, page 6915.

Court directed to the Circuit Court of Appeals for the Tenth Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record in the cases numbered on its docket, Nos. 2906, 2907, 3106, 3107, 3108, and entitled *In re: The Denver and Rio Grande Western Railroad Company, Debtor,* then and in that event it also issue such a writ pursuant to this Petition to the end that the determination and opinions of the Circuit Court of Appeals may be reviewed in respect of all questions before it and that your Petitioner be given such other relief in the premises as to this Court may seem proper.

Respectfully submitted,

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July 31, 1945.

APPENDIX A

UNITED STATES CIRCUIT COURT OF APPEALS

TENTH CIRCUIT

Nos. 2906, 2907, 3106, 3107 and 3108—NOVEMBER TERM, 1944.

In the Matter of The Denver and Rio Grande Western Railroad Company, a corporation, Debtor. The Denver and Rio Grande Western Railroad Company, a corporation, Debtor, Appellant, *vs.* Insurance Group Committee, *et al.*, Appellees.	Appeals from the United States District Court for the District of Colorado.
The Denver & Salt Lake Western Railroad Company, a corporation, Debtor, Appellant, *vs.* Insurance Group Committee, *et al.*, Appellees.	Appeals from the United States District Court for the District of Colorado.
City Bank Farmers Trust Company, a corporation, as Trustee under the General Mortgage, February 1, 1924, of The Denver and Rio Grande Western Railroad Company, Appellant, *vs.* Insurance Group Committee, *et al.*, Appellees.	Appeals from the United States District Court for the District of Colorado.

The Denver and Rio Grande Western Railroad Company, a corporation, Debtor; and The Denver & Salt Lake Western Railroad Company, a corporation, Subsidiary Debtor, Appellants, *vs.* Insurance Group Committee, *et al.*, Appellees.	Appeals from the United States District Court for the District of Colorado.
Guy A. Thompson, as Trustee of the Missouri Pacific Railroad Company, Appellant, *vs.* Insurance Group Committee, *et al.*, Appellees.	Appeals from the United States District Court for the District of Colorado.

[May 10, 1945]

Before PHILLIPS, HUXMAN, and MURRAH, Circuit Judges

PHILLIPS, Circuit Judge, concurring:

The broad language of the Supreme Court in the Western Pacific case and the Milwaukee case[1] compels me to conclude that we cannot disturb the Commission's finding of valuation nor the finding of the Commission, confirmed by the trial court, that the equities of the unsecured creditors and the preferred and common stockholders have no value. Nevertheless, I feel impelled respectfully to suggest that the elimination of a substantial portion of the claim of the holders of the general mortgage bonds and all of the claims of stockholders and unsecured creditors, on the basis of a valuation resting wholly on an estimate of

[1] Ecker *v.* Western Pacific R. Corp., 318 U. S. 448; Group of Investors *v.* Milwaukee R. Co., 31 U. S. 523.

future earnings, is harsh treatment of such claims. I say this because, while according expertness to the Commission, it is my opinion that such future earnings cannot be estimated with a degree of certainty that is not likely to result in grave injustice.

The injustice to junior security holders which may result from a valuation based solely on an estimate of future earnings has aroused the attention of Congress and corrective legislation has been introduced. H. R. 4960 has already passed the House and is pending before a Senate Committee.[2]

On November 1, 1935, during the depths of the national depression, the debtor came into court for reorganization.

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[2] The House Judiciary Committee, in its unanimous report (78th Cong., 2d Sess., Report No. 1615) recommending passage of H. R. 4960, in part said:

"The purpose of the bill is to correct a very serious situation arising from the interpretation placed by the Interstate Commerce Commission and the courts upon the amendments of section 77 enacted by the Congress August 27, 1935. We believe this situation results from a misapprehension of the intention of Congress with respect to the 1935 amendments. The consequences have been and are so disastrous to railroad investors, and so dangerous to the credit of the railroads in general, that they should be corrected by legislation.

"From a legal standpoint, the problem may be stated simply. Section 77 was directed primarily to the relief of financially embarrassed railroad companies through a revision of their capital structures and a reduction of fixed charges. It does not expressly provide for any reduction in the existing total capitalization; but the Interstate Commerce Commission has interpreted paragraph (d) of the section as authorizing it to fix the total capitalization of the reorganized company. In so doing, it has estimated a 'capitalizable value of the assets' of the property based almost entirely upon 'earning power'—earning power of the property, past, present and prospective—as these words are used in section 77(e). Its estimates of prospective earning power are necessarily speculative. Nevertheless it has used its estimates of earning power to fix capitalizations in all cases very substantially below the existing capitalizations, regardless of the investment in the property and of the valuation previously determined by the Commission under section 19a of the Interstate Commerce Act. The Supreme Court in passing upon two major reorganization plans—the Western Pacific and the Chicago, Milwaukee, St. Paul & Pacific—upheld the Commission in this interpretation of the section, and has further held that the Commission's findings will not be disturbed where there is some evidence to support them. In other words, these administrative findings are beyond judicial review.

"The result of this interpretation of the statute by the Commission, and the subsequent refusal of the courts to review the Commission's findings, has caused the destruction of hundreds of millions of dollars of railroad securities representing actual investment in the property

At that time the debtor's senior debts ahead of the general mortgage bonds aggregated slightly over $101,000,000 and the claim of the general mortgage bondholders aggregated about $30,000,000. With an immediate reorganization, a capitalization of $132,000,000 would have been adequate to give the general mortgage bondholders new stock equal to 100 per cent of their claim. No capitalization or valuation ever proposed for the debtor, in any plan presented, has

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made, to some extent at least, in reliance upon the belief that such investments could not be confiscated except by due process of law.

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"In five major companies now undergoing reorganization, the reductions in capitalization aggregate some $600,000,000, meaning that this amount of railroad securities has been eliminated in the reorganization of these five companies alone, although there is no question that the investment in road and equipment and the 19a valuations at the present time are far in excess of the capitalization determined by the Commission. The same is true generally of the other roads involved in reorganization, these five being specifically mentioned, because they are included in one exhibit submitted to this committee by the Interstate Commerce Commission (hearings on H. R. 2857, serial No. 9 p. 199).

"That this situation has created an unbearable hardship upon the junior investors in railroad securities and constitutes a real danger to railroad credit may be easily seen from a glance at current railroad earnings. In 1942 the Missouri Pacific earned $32.67 a share on the common stock outstanding under the old capitalization; the Denver & Rio Grande Western, $34.40 a share; Rock Island, $25.11; Frisco, $18.03; St. Louis Southwestern, $27.23. These figures approximately were repeated in 1943, and the high earnings are continuing in 1944. Yet these stocks, which have demonstrated such an earning power, have been absolutely wiped out in reorganization, and the stockholders are without remedy. Moreover, the junior securities of all these roads have been drastically cut in reorganization and the senior securities have been very largely converted into income bonds and preferred and common stock. In one case, the Commission estimated a normal earning power of $11,000,000, and based its capitalization upon that figure; yet in the same year in which the Commission's plan was announced (1941) that road earned more than $18,000,000. In 1942, it earned $36,000,000, and in 1943 $37,000,000. Nevertheless the Commission still says the old common stock is worthless. The stockholders are without remedy. There is in practical effect no judicial review of the action of the Commission. Although its guess as to future earning power has been demonstrated to be wrong, its findings are final.

* * * * * *

"The primary purpose of the bill is to insure that the courts shall make an independent judicial review of each plan and of the evidence upon which the plan is based. Under the existing statute, the Commission is required to certify to the court a transcript of its proceedings; and the court is required to notify all parties and, if objections are filed, to have a hearing. The effect of the proposed amendments is to require the judge to make an independent judicial determination of the facts

been that low. During the eight years' delay in reorganization (in nowise due to the general mortgage bondholders, but, at least in part, to controversies among the senior security holders) and up to January 1, 1943, the effective date of the plan, the claims of the senior security holders, due to the accrual and nonpayment of interest, increased about $38,000,000. The debtor's net income available for interest during the trusteeship to the end of 1944 amounted to $49,420,972. It exceeded by approximately $9,500,000 the interest charges which accrued on the claims of senior security holders to the end of that year. As of December 31, 1935, the debtor's current assets were $9,727,230 less than its current liabilities. As of December 31, 1944, the debtor's current assets exceeded its current liabilities by $12,125,863.50. Thus, it will be seen there has been a favorable change in the current situation of $21,853,093, and, moreover, since the plan was formulated, the Junction Bonds have been paid and equipment obligations have been reduced from $5,758,000, the amount provided for in the plan, to $4,540,000, a reduction in that requirement of $1,218,000.

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found by the Commission, and not to hold that the administrative finding of the Commission is beyond judicial review. With this object in mind, the bill provides that the judge shall not only be satisfied that the plan complies with the provisions of subsection (b) as in the present statute, but must also be satisfied that it complies with the provisions of subsection (d), which the Supreme Court held was not within the province of judicial review. This will add nothing to the requirements of the present statute as to the hearing and the scope of the evidence; it will merely direct the courts to exercise the traditional right of review, and to give the parties and the public the benefit thereof.

"Second, and as a means of insuring that the Interstate Commerce Commission shall be guided by some standard in determining the permissible capitalization of the reorganized company, the bill provides that the existing total capitalization shall not be reduced below the lower of either the investment in the property or the physical valuation as previously determined by the Commission under section 19a. Naturally, if the existing capitalization exceeds the investment, it should be susceptible of reduction, if the Commission finds it is not supported by earning power; or, if the existing capitalization exceeds the physical valuation found by the Commission, it should be susceptible of reduction, unless in that event the Commission deems the earning power sufficient to support it. But where the existing capitalization represents actual investment in the property, or where it is not in excess of the value determined by the Commission under the mandate of law, then it should not be disturbed."

Approximately $43,000,000 of the income available, but not used, for the payment of interest has been expended in permanent improvements and betterments. While the investment value of the debtor's property thus was substantially increased, the Commission's valuation, based on estimated future earnings, was not increased proportionately. As a result, the claim of the senior security holders has increased and the participation of the general mortgage bondholders has been pressed downward until it is now fixed at 10 per cent of the new common stock. Many of the improvements and betterments referred to above, have substantially increased the capacity of the railroad to handle increased traffic as it arises. Central train control installed in many segments, where the greatest density of traffic obtains, gives to those segments, in a large degree, the equivalent of a double-track railroad and increases the number of trains that can be operated over the road and the volume of traffic that can be handled by the road. Other of such improvements have contributed to efficiency and economy in operations. These improvements have enabled the debtor to handle the great increase in traffic resulting from the war effort and have placed the debtor in a position to more economically and efficiently handle a volume of traffic largely in excess of its prewar traffic, should future economic conditions produce such traffic. Under the plan approved and confirmed by the district court, 90 per cent of the common stock goes to the holders of the senior securities and 10 per cent to the general mortgage bondholders. As a result, should there be a substantial increase in the debtor's postwar traffic over its prewar traffic, 90 per cent of the increased earnings will inure to the benefit of the holders of the senior securities and only 10 per cent to the general mortgage bondholders, whose claim was decreased 90 per cent by reason of the failure to discharge interest accruals with income available therefor and the diversion of such income to the cost of such permanent improvements. It seems to me, under all these circum-

stances, that, in addition to the other adjustments required to make the plan fair and equitable, the Commission should endeavor to modify the plan so as to give relief from the situation that lets the full impact of the improvement program fall upon the claim of the general mortgage bondholders and accords them no corresponding benefits.

By confirming the finding of the Commission that the equities of the unsecured creditors and the stockholders are without value, based on an estimate of future earnings, an estimate at best shrouded in uncertainty, the court, by judicial fiat, has forever forfeited and destroyed the rights and interests of such creditors and stockholders in the assets of the debtor, a result which, under well-settled principles, a court of equity will ordinarily avoid.

It may be urged that the elimination of the stock will provide the debtor with a stronger financial structure and enable it to better serve the public interests, but private property cannot be taken in the public interest without just compensation.

Even if viewed solely from the standpoint of future earnings, it would seem that it should not be said such stock is without value merely because, during periods of receding economy and depression, the earnings of the debtor will not be sufficient, after payment of prior claims, to provide funds from which dividends on such stock can be properly paid. Such stock has value, if, during periods of expanding economy and prosperity, the earnings of the debtor will be sufficient to provide for prior claims and leave a surplus from which substantial amounts can be lawfully paid as dividends thereon; and a finding of no value should not be made if there is reasonable probability that earnings will be realized from which substantial dividends can be paid, even though only during periods of economic prosperity.

It seems to me, under the facts presented on this record and those of which we may take judicial notice, that it is not unlikely the estimate of future earnings of the debtor made by the Commission will fall far short of its actual future earnings. Should the estimated earnings prove to be substantially under the actual earnings, the injustice that will result to the holders of the general mortgage bonds and to the stockholders of the debtor is obvious.

It may be reasonably assumed that a substantial portion of the war industries contributing traffic to the road will be succeeded by permanent industries. For example, it is common knowledge that the Kaiser Industries and one of the large Eastern steel companies have indicated a desire to acquire and continue the operation of the Geneva Steel Plant, a large and modern steel plant built on the debtor's line of railroad. In the areas tributary to debtor's line of railroad, there is an abundance of cheap power and of fuel and ore. Many heavy traffic-producing enterprises have been and are being established in new areas tributary to the debtor's line of railroad. It is reasonable to believe that this industrial development will continue.

Furthermore, changes in national income at constant prices have an approximately constant relationship to changes in ton-miles of traffic. It may be said, in general, that traffic is so related to national income that when that income rises by one billion dollars, traffic rises by about 6.6 billion ton-miles. Certain federal agencies have made estimates of the national income for the years 1947 to 1949. These estimates predict a national income of approximately 135 billion dollars in 1947 and a rising national income in 1948 and 1949, reaching 150 billion dollars in the latter year.[3] This would indicate a postwar railroad traffic reaching in 1949 a level of that traffic during 1943.

[3] See Post-War Traffic Levels, prepared by Spurgeon Bell, Head Transport Economist, and L. E. Peabody, Principal Transport Economist, of the Interstate Commerce Commission, pp. 42-71, 90-114.

Moreover, the ratio between ton-mile revenue of Class I railroads and the number of factory workers engaged in the production of durable goods is fairly constant. It is 100,000 revenue ton-miles for each factory worker. That there will be a determined effort to provide jobs for upward of 55 million workers early in the postwar period is a well-known fact. This indicates a greatly increased postwar railroad traffic. Moreover, the record demonstrates that, with the exception of a slight dip in 1923, the debtor has been securing a constantly increasing proportion of the operating revenues of Class I railroads. If the debtor should enjoy postwar earnings approximating its 1943 earnings, it is clear that the valuation found by the Commission should be substantially increased. But, as suggested above, it is my conclusion that only through corrective legislation or a more liberal attitude on the part of the Commission can the junior security holders obtain relief.

No.'s 286 and 291

IN THE

Supreme Court of the United States

October Term, 1945

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,

Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION, ET ALS.,

Respondents.

[No. 286]

GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, DEBTOR,

Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION, ET ALS.,

Respondents.

[No. 291]

BRIEF IN OPPOSITION TO PETITIONS FOR CERTIORARI

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BRIEF IN OPPOSITION TO PETITIONS FOR CERTIORARI

A
INTRODUCTORY STATEMENT

In the Denver and Rio Grande Western Railroad Reorganization two petitions for writs of certiorari have been filed in order to procure some allowance of new securities to the holders of the old stock. Of those petitions (the Stockholder Petitions) one is filed by The Denver and Rio Grande Western Railroad Company (the Debtor, No. 286) as a purported representative of the old preferred and common stock, the other by Guy A. Thompson, Trustee, Missouri Pacific Railroad Company (the Missouri Pacific, No. 291) as the holder of one-half of the old common stock. Though their reasoning differs, their aim is the same (recognition of the old stock) and they arise from the same reorganization, so both are answered in this one brief.

The parties to this brief are, or represent, holders of senior securities involved in the reorganization. Reconstruction Finance Corporation and Insurance Group Committee are large holders. The other parties hereto are indenture trustees under the senior mortgages.

While this reorganization involves a number of important questions that are of general concern and should be authoritatively resolved*, it does not follow that all the other questions involved are of that character. On the contrary, other phases of the Commission's task below were, of course, merely an application to the facts in this reorganization of

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* See the Petition for writs of certiorari, dated July 31, 1945, that has been filed by the parties to this brief (No.'s 278-282, this Term). References herein to the record are to the record as filed in those cases, and the forms of reference are defined at p. *iv* of the Petition therein.

standards already settled by decisions of this Court. It is within that area that the Stockholder Petitions lie.

The Debtor's petition asserts that the whole philosophy of reorganization should now be re-written by this Court (Petition, pp. 3-9), but, failing that (on which we think no comment necessary), merely asks that a writ be granted to review the Circuit Court's approval of the exclusion of the old stock if, but only if, writs be granted in No.'s 278-282 to review the Circuit Court's disapproval of the Plan in other respects. No reasons are assigned for this request, except that the case, if brought here at all, may be brought "in its entirety" (p. 2). But that is a mistaken appeal. Resolution of the novel questions presented in No.'s 278-282 will in no way be impeded by the elimination, or aided by the inclusion, of the routine questions determining stockholder recognition. We think no further comment on the Debtor's Petition is needed.

The Missouri Pacific Petition does assign reasons for its request, but the questions to which they relate are, as indicated in the Argument below, not presented by the record.

B
ARGUMENT

Recognizing that the scope of the Commission's administrative functions in determining the permissible amount of the new capitalization has been settled by *Ecker* v. *Western Pacific R.*, 318 U. S. 448 (1943) and *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R.*, 318 U. S. 523 (1943), the Missouri Pacific Petition seeks to show a reversible error of law within the meaning of those decisions by the assertion that the Commission was governed exclusively by the record of past earnings in times of depression, and gave no consideration to other factors.

But that is not true.

The Commission did not use as its decisive criterion the past earnings of any period, whether depressed or prosperous. It looked to prospective earning capacity for the long-term future. For an intelligent appraisal of that determinant, it had before it, and considered (as its Reports show), information on every factor significantly affecting the road's chances for obtaining and handling any particular physical volume of business in the future and for translating that service into net earnings available for return to security holders. For example it weighed, with obvious care, voluminous evidence on past and present trends of traffic (including the development of new sources of traffic in wartime), the large improvements that have been made to the property and the trend of unit costs of operation as affected by those improvements and by other developments of an apparently secular character.* In short, the record of past earnings was only one of the factors surveyed in this broader setting as clues to the probable range of future earnings experience.

There is, accordingly, no basis for an argument that the Commission founded its action only on the record of past earnings. There is still less basis for the argument, which is the main premise of the Missouri Pacific Petition, that the earnings so used were those of depression years alone. The facts on their face preclude any such contention for the approved capitalization is so large that a fair return on the new securities would not be provided by the earnings of the past, looking for this purpose not to depression years, but to the average earnings of all the years, good and bad, in the last quarter of a century.

Annual requirements under the Plan through dividends on the Preferred Stock on all securities to be publicly held or

* E. g., Submission Pamphlet 42-48, 66-69, 82-85, 118-121, 122-125, 156-159.

pledged under the new notes are $4,487,015.* This rises to a total of $6,649,449 if dividends are included on the new common stock at 5%. Historical earnings, however, for the whole period 1921-1944 are substantially less than this total. After Federal income taxes at an assumed rate of 35%, the average annual earnings for that period are only $4,647,000.** After Federal income taxes as reported in those years, the corresponding figure is $5,314,000.† The "depression" earnings of 1932-1935, considered by the Commission on the point of permissible new fixed charges, which, in contrast to dividends on stock, must be earned under the *most adverse* conditions reasonably foreseeable, were $3,600,000. Clearly, therefore, the Commission could not have given decisive effect to depression earnings in its determination of the total permissible new capitalization, but must have given substantial weight to the prosperous years before the depression and the extraordinary war years that have followed it. Indeed, the total new capitalization is so large that nothing at all was earned for the new common stock in any year of that whole period except in the peak prosperity years of 1925-1930 and the extraordinary war years of 1942-1944.

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* This does not include equipment trust interest or interest on new securities originally provided for an issue (the Junction Bonds) since acquired by the estate.

** Computed from annual statements of record (Tr. III 19-348 and 547). Minor accounting adjustments required by the Commission are reflected. The income tax rate is taken merely as an illustration and is applied as if the Plan had been in effect throughout the total period. Earnings through 1942 (the year of greatest net earnings in all history) were before the Commission; those of 1943-1944 are in the present record and are included in the calculation.

† Federal income taxes actually reported in the past are, of course, an inadequate measure of the future burden because (*i*) pre-war rates were lower than probable rates for the long-term post-war future, and (*ii*) the road was shielded from their impact by the deductions available under its excessive debt capitalization, which is now to be ended.

There has been no materially advantageous change of conditions since the Commission acted. On the contrary, the largest Gross Income* of the Debtor in all history was before the Commission when it acted and was referred to in its report.** Since then Gross Income has drastically declined. While this was in large part due to an increase in income taxes, it is also true that the sum of Gross Income and the amount deducted for income taxes has been progressively less in spite of large war-time increases in Railway Operating Revenues.† This reflects an apparently inexorable continuation of the rising trend in unit costs of operation that has characterized the position of the railroads for a number of years. Thus despite $15,000,000 more Railway Operating Revenues in 1943, the balance carried down to Gross Income and income taxes was less. Railway Operating Revenues in 1944 were at the 1943 level, but further increases in operating costs left $3,000,000 less for Gross Income and income taxes.

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* Total Railway Operating Revenues less railway operating expenses and taxes (including income taxes) plus or minus the net balance of payments for hire of equipment and joint facilities produce net railway operating income. Adding other income, we get Gross Income. Deducting miscellaneous deductions from income, we get income available for fixed charges (or "available for interest" if, as in the case of the Debtor, the miscellaneous deductions include rent for leased road and interest on unfunded debt). The text uses Gross Income rather than the last account to avoid a distortion (disadvantageous to the Stockholder Petitions) otherwise arising from a special charge among miscellaneous deductions in 1944.

** Pages 158-9 of Submission Pamphlet.

† These are the reported figures in (000's):

	1942	*1943*	*1944*
Gross Income	$17,444	$12,305	$10,912
Income taxes	2,180	7,184	5,338
Total	19,624	19,489	16,250
Ry. Operating Rev.	54,475	70,194	70,347

Source: Tr. II 353 and Tr. III p. 547.

If operating results show such a pattern with the unprecedented volume of business carried in war years, surely the Commission was entitled to its apprehensions for the post-war future that has now begun, when the Debtor's traffic can no longer be sustained at such levels by the wholly extraordinary, and it is hoped non-recurring, conditions of the war in the Pacific.

So in this case the change of conditions since the Commission's action has been adverse. But even were it favorable, the Court has made it clear that "the bulge of war earnings" is not to be allowed to upset Commission plans (*Milwaukee Case* above at p. 543-4; *Western Pacific Case* above at pp. 508-9; see also *I. C. C.* v. *Jersey City,* 322 U. S. 503, 1944).

It is therefore beyond the reach of argument that the Commission had before it an adequate and representative record and applied proper standards in determining the total permissible new capitalization. Indeed, in doing so, it went farther, and permitted a relatively larger new capitalization than is its general practice.*

It may also be pertinent to note, for the interest of the asserted issues is not unrelated to the position of him who asserts them, that the new securities (even when taken at their face amount) fall far short of covering the total claim of creditors. Most conspicuously, the General Mortgage bondholders, for their total claim of nearly $44,000,000,

* The new capitalization in this case is larger than in the average of all other important railroad cases, whether viewed in relation to the largest earnings in any year of the decade 1930-1939 or in relation to the physical values found by the Commission. The facts from which this purely mathematical calculation has been made appear in the published reports of the Commission and may be judicially noticed. The trial court, with its large administrative experience with the property, was troubled on this score, saying " . . . it is very doubtful in my mind if the new capital structure is not too large" (Tr. II 467).

receive only 10% in new common stock taken at its par value, leaving 90% of their claim unrecognized. All of that would, of course, have to be satisfied in full before anything of value could be found for junior interests. There is no possibility of such miracles.

We submit, therefore, that Questions 1 and 2 in the Missouri Pacific Petition (whether the Commission may "give effect only to past earnings" in "years of . . . depression") are not presented by the record.

Question 3 in the Missouri Pacific Petition (whether old stock may be excluded despite "a reasonable probability" of earnings in prosperous years adequate to permit "substantial dividends") is also not presented by the record, for there is no such "reasonable probability." On the contrary, the new common stock given to senior bondholders is so far removed from earnings that, after Federal income taxes at 35%, common dividends at 5% have never been earned except in the extraordinary war years of 1942-1944; indeed the balance of earnings after such dividends for the whole period 1921-1944 was a deficit of nearly $60,000,000.* When a representative average is inadequate for a fair return, the top earnings of peak years included in the average are not available for any junior interests. Particularly not for the old stock championed by the Missouri Pacific Petition, for all of it is separated from these earnings by the $40,000,000 vacuum of the unsatisfied General Mortgage

* The computation is the same as that referred to in note ** on page 4 above. The elimination of all Federal income taxes would still leave a cumulative deficit (of about $26,000,000) and would add only three other years when 5% common dividends would have been covered—1926 when the remainder of earnings would have been $700,000, and 1928, $220,000, and 1929, $1,800,000. The old stock is not entitled to compute earnings on the basis of the old capitalization with its heavy debt structure which the road could not support in the past and the public interest can not tolerate in the future.

claim. We say, therefore, that there is no reasonable probability of earnings available for dividends on the old stock in any years, but on the contrary an evident exclusion of any such probability.

The Missouri Pacific Petition is thus no more than an appeal for a new exercise of administrative judgment, on the ground that, within the area of permissible administrative judgment, the new capitalization might have been, and should have been, fixed at a substantially greater amount than the Plan provides.

This is not a justiciable question and, if it were, it would be merely a question of the proper appraisal of the earnings prospects of this particular road. That is not a question of any general interest. The Petition should, therefore, be denied, as was the analogous petition in *Chicago and North Western R.* v. *Mutual Savings Bank Group Committee,* 318 U. S. 793 (1943).

Such arguments are at bottom mere requests for re-examination of the facts. This Court has repeatedly refused to re-examine findings of fact approved both by a District Court and by a Circuit Court (v. *Tennessee Coal, Iron & Railroad Co.* v. *Muscoda Local,* 321 U. S. 590, 605, conc. op., 1944) and administrative findings approved by a Circuit Court (*National Licorice Co.* v. *N. L. R. B.,* 309 U. S. 350, 357, 1940). On the decisive point of the Stockholder Petitions all three tribunals have concurred.

C

CONCLUSION

The Stockholder Petitions raise no question of general interest, and, indeed, raise no arguable question of any kind.

We respectfully submit that they should be denied.

Dated September 8, 1945.

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No. 291

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor,
Petitioner,

v.

RECONSTRUCTION FINANCE CORPORATION et al.,
Respondents.

(And other cases as shown on page 1.)

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Tenth Circuit.

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INDEX.

Cases Cited.

Statutes Cited.

TITLES OF CASES

In Which This Petition Is Filed.

Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor,

Petitioner,

v.

The Denver and Rio Grande Western Railroad Company et al.,

Respondents.

(Number 2906 below)

Same

v.

The Denver and Salt Lake Western Railroad Company et al.,

Respondents.

(Number 2907 below)

Same

v.

City Bank Farmers Trust Company, Trustee, et al.,

Respondents.

(Number 3106 below)

Same

v.

The Denver and Rio Grande Western Railroad Company et al.,

Respondents.

(Number 3107 below)

Same

v.

Reconstruction Finance Corporation, Insurance Group Committee, Central Hanover Bank and Trust Company, Trustee, United States Trust Company of New York, Trustee, Guaranty Trust Company of New York, Trustee, and The Chase National Bank of the City of New York, Trustee,

Respondents.

(Numbers 2906, 2907, 3106, 3107, 3108 below)

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Tenth Circuit.

Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, prays that a writ of certiorari issue to review the decrees of the United States Circuit Court of Appeals for the Tenth Circuit, entered May 10, 1945, reversing orders of the District Court for the District of Colorado, approving and confirming a Plan of Reorganization under Section 77 of the Bankruptcy Act for The Denver and Rio Grande Western Railroad Company (the debtor) and The Denver and Salt Lake Western Railroad Company (the subsidiary debtor).

Petitioner holds title to 150,000 (50 per cent) shares of the no par common stock, $608,800 preferred stock, and $1,000,000 of Refunding and Improvement Mortgage Bonds of The Denver and Rio Grande Western Railroad Company, by reason of which ownership the interest of petitioner will be materially and adversely affected if the Plan finally be made effective. The Interstate Commerce Commission held that the equities of the owners of the common

and preferred stock of the Debtor had no value, and denied to petitioner the right to participate in any Plan of Reorganization.

The District Court approved the Plan of the Commission. The United States Circuit Court of Appeals for the Tenth Circuit on appeal reversed the District Court, but held that no valuation based on any reasonable estimate of prospective earnings could be sufficiently large to pay the stockholders anything, and approved the finding of the Commission and the District Court that their claims are valueless and barring them from participation in the Plan.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals is not yet reported.

The opinion of the District Court (Submission Pamphlet, Page 187) is not reported, except in C. C. H. Bankruptcy Law Service, at Paragraph 54562 and Paragraph 55008.

The reports of the Interstate Commerce Commission (Submission Pamphlet 29, 98, 113 and 151) are reported in 233 I. C. C. 515; 239 I. C. C. 583; 254 I. C. C. 5, and 254 I. C. C. 349.

JURISDICTION.

The decrees of the Circuit Court of Appeals were entered May 10, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., Section 347).

QUESTIONS PRESENTED.

1. Whether the Interstate Commerce Commission (hereinafter called the Commission), in arriving at the value of the property of a railroad company undergoing reorganization, may give effect only to past earnings in arriving at the value of the property in question, and disregard

changed conditions, improvements to the property, and all other elements of value.

2. Whether, in determining the prospective earnings of the properties of the Debtor, present earnings may be disregarded and the equities of the stockholders be held to be without value because of diminished earnings during the years of national receding economy and depression.

3. Whether a finding that the equities of the stockholders are of no value can lawfully be made if there is a reasonable probability that earnings will be realized from which substantial dividends can be paid, even though only during periods of economic prosperity.

STATUTE INVOLVED.

The pertinent provisions of Section 77 of the Bankruptcy Act, as amended, 49 Stat. 911, c. 744, 11 U. S. C. A., Sec. 205, are attached hereto as Appendix 1.

STATEMENT.

The petition of the Debtor for reorganization under Section 77 of the Bankruptcy Act, as amended, was filed in the District Court for Colorado on November 1, 1935. After hearings in 1936 and 1937, the Commission approved a Plan of Reorganization which was disapproved by the District Court on March 7, 1941. Further hearing was held by the Commission in May, 1941, which was followed by further evidence taken at the District Court in 1942 and 1943. After hearings, the District Court approved the Plan on October 25, 1943, and after submission to creditors confirmed it on November 29, 1944.

The Debtor appealed from both these orders. The Petitioner appealed from the decree of the District Court entered November 29, 1944, confirming the Plan. All appeals were disposed of by the Circuit Court of Appeals in its Opinion and Decree of May 10, 1945.

REASONS FOR GRANTING THE WRIT.

Question 1.

Subsection (e) of Section 77 of the Bankruptcy Act, as amended, provides, in part, that—

> "The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts."

In the cases of **Ecker v. Western Pacific R. Corp.** and **Institutional Investors v. Chicago, M. St. P. & P.*** it was held that in determining whether the equities of stockholders in railroad companies undergoing reorganization had or had not value, the issue involved in such a determination is whether there is a reasonable probability that the earning power of the road will be sufficient to pay prior claims of interest and principal and leave some surplus for the service of the stock; and it was also held that if it be established that there is no reasonable probability of such earning power, then the inclusion of the stock would violate the full priority rule of the **Boyd Case.**†

The question turns, then, on what must be considered in determining the future earnings of the property, because the determination of future earnings settles the value of the property involved in so far as the equities of the stockholders are concerned.

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*Ecker et al. v. Western Pacific Railroad Corporation, 318 U. S. 448; Group of Institutional Investors et al. v. Chicago, Milwaukee, St. Paul & Pacific Railroad Company, 318 U. S. 523.

†Northern Pacific Railroad Company v. Boyd, 228 U. S. 482.

The statute requires that the value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present and prospective, and all other relevants facts. The Commission had before it the investment of the Debtor and its several corporations in road and equipment (Submission Pamphlet, Page 35), showing, as of December 31, 1935, a grand total of $238,750,511. When the District Court approved the plan, additions and betterments during the trusteeship had been made to the properties at a cost of approximately $40,000,000 (Submission Pamphlet, Page 195), and in determining the prospective earning power of the property, the Commission first found, for the combined properties, for the first five years, 1927-1932, available for interest, average earnings of $8,103,881; a four-year average, 1932-1935, of $3,606,921; and a three-year average, 1936-1938, of $1,128,819.

Against this, the earnings of the combined properties available for interest during the following years were:

1942	$17,044,420.39	
1943	$11,573,667.93	
1944	$10,617,416.48	(for the first 11 months only)

Under the finally approved Plan, fixed interest charges would approximate $1,694,941; prior contingent interest charges, $498,318; and contingent interest charges, $1,364,-133. Including the payments to sinking funds and the capital fund, the total to charges before dividends on the preferred stock would be $4,584,689.

The value of the combined properties for the purposes of the proceeding was found by the Commission (Submission Pamphlet, Page 159) to be approximately $155,173,127.

It appears that present earnings of the Debtor were given no effect in determining what might be the future earnings of the property, and that the four-year average, 1932-1935,

of $3,606,921, formed the basis for the final conclusions of the Commission as to what the property could probably earn for the future.

This Court is asked to review this proceeding and determine whether—

Investments of the carrier in road and equipment, additions and betterments, during the period when the carrier is undergoing reorganization, and the present earnings of the carrier, may be given no effect in determining what a railroad property may reasonably be expected to earn for the future.

Question 2.

It is respectfully suggested that this Court should pass upon the question of whether past earnings of a railroad property undergoing reorganization, when such past earnings are brought about because of a national receding economy and depression, should be the determining factor in arriving at a conclusion as to the future earnings of such property.

During the years 1931 to 1939 a general depression occupied the field of industry and many stable corporations were unable, during that period, to earn their fixed charges.

The Plan formulated by the Commission and approved by the District Court proceeds upon the theory that while industry as a whole might entirely recover, railroads, when the present world war is over, will return to earnings available during depression years, and that the value of properties of railroads undergoing reorganization should be determined upon that basis.

Because of the fact that many railroads are now undergoing reorganization, it is regarded as essential that this Court determine what effect is to be given the earnings during these depression years in arriving at a conclusion as to the probable future earnings of such carriers.

Question 3.

Viewed solely from the standpoint of future earnings, it appears that the equities of the stockholders of the Debtor should not be found without value, when it appears that during periods of economic prosperity, the earnings of the Debtor will be sufficient to provide for prior claims and leave a surplus from which substantial amounts can be lawfully paid as dividends.

Subsection (b) of Section 77 of the Bankruptcy Act provides that a plan may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive or to subscribe for securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan.

If we eliminate from consideration the earnings of the property of the Debtor during the depression, and give effect only to earnings prior to such depression and subsequent thereto, it appears that it may not lawfully be found that the equities of the stockholders of the Debtor are entirely without value.

Should the estimated earnings prove to be substantially under the actual earnings, the injustice that will result to the stockholders of the Debtor is obvious.

It seems reasonable, therefore, to request this Court to pass upon the question of whether, in the light of apparent large earnings, the stockholders of the Debtor should be denied any participation in a plan of reorganization. Certainly, a large question is presented—whether such stockholders should not be permitted to have issued to them options or warrants to subscribe for stock in the new company upon such terms and conditions as may be found to be reasonable.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, to review the decrees of the United States Circuit Court of Appeals for the Tenth Circuit, entered on May 10, 1945, reversing orders of the District Court for the District of Colorado, approving and confirming a Plan of Reorganization under Section 77 of the Bankruptcy Act for The Denver and Rio Grande Western Railroad Company, Debtor, and The Denver and Salt Lake Western Railroad Company, Subsidiary Debtor. The decrees of said Circuit Court of Appeals sought to be reversed were entered in cases numbered on its docket, Nos. 2906, 2907, 3106, 3107, 3108, and entitled **In re: The Denver and Rio Grande Western Railroad Company, Debtor.**

Respectfully submitted,

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Dated August 1, 1945.

APPENDIX.

Excerpts From Section 77 of the Bankruptcy Act As Amended.

(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings, experience, and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations, the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset

price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the curing or waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, the amendment of the charter of the debtor, and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section.

The adoption of an executory contract or unexpired lease by the trustee or trustees of a debtor shall not preclude a rejection of such contract or lease in a plan of reorganization approved hereunder, and any claim resulting from such rejection shall not have priority over any other claims against the debtor because such contract or lease had been previously adopted. The term "securities" shall include evidences of indebtedness either secured or unsecured, bonds, stock, certificates of beneficial interest therein, certificates of beneficial interest in property, options, and warrants to receive, or to subscribe for, securities. The term "stockholders" shall include the holders of voting-trust certificates. The term "creditors" shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.

The term "claims" includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character. For all purposes of this section unsecured claims, which would have been entitled to priority if a receiver in equity of the property of the debtor had been appointed by a Federal court on the day of the approval of the petition, shall be entitled to such priority and the holders of such claims shall be treated as a separate class or classes of creditors. In case an executory contract or unexpired lease of property shall be rejected, or shall not have been adopted by a trustee appointed under this section, or shall have been rejected by a receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, or shall be rejected by any plan, any person injured by such nonadoption or rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings. The provisions of section 60 of this Act shall apply to a proceeding under this section. For all purposes of this section any creditor or stockholder may act in person or by an attorney at law or by a duly authorized agent or committee subject to the provisions of sub-section (p) hereof. The running of all statutes of limitation shall be suspended during the pendency of a proceeding under this section.

(c) (10) The judge may direct the debtor or the trustee or trustees to keep such records and accounts, in addition to the accounts prescribed by the Commission, as will permit of such a segregation and allocation, as the necessities of the case may require, of the earnings and expenses between and to the divisions and parts of the railroad or other property of the debtor which are separately subject to the liens of the various mortgages or deeds of trust, or

are separately subject to lease, and may refer to the Commission for its recommendations after hearings thereon if the parties shall so request and/or the Commission determine necessary or desirable, as to the method or formula by which such segregation and allocation shall be made; and thereafter such segregation and allocation may be made at the expense of the debtor's estate.

(c) (11) The Commission may direct such of its agencies as it may designate to file in the proceedings before the Commission a report, and additional or supplemental reports at such time or times as the Commission shall designate, of such data with reference to the property, business, earnings, and corporate organization of the debtor and such other facts as the Commission, after hearing if it deems necessary, shall determine to be necessary or helpful information for the purposes of the preparation of reorganization plans, and for the purpose of aiding in determining the method or formula of allocating earnings permitted by subdivision (10) of this subsection (c). Such report or reports shall be prima facie evidence of the facts therein stated in any proceeding under this section. The actual cost of preparing said report or reports shall be certified by the Commission and shall be borne by the debtor's estate.

(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such

claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) hereof. If the judge shall approve the plan, he shall file an opinion, stating his con-

clusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) hereof, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: **Provided,** That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: **Provided further,** That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United

States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the President of the United States or any officer or agency he may designate, is hereby authorized to act in respect of the interest or claims of the United States or of such agency or other corporation. The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate. The Commission shall certify to the judge the results of such submission.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: **Provided,** That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e). If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons there-

for. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts.